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Aboriginal Rights, Aboriginal Culture, and Protection

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ABORIGINAL RIGHTS, ABORIGINAL CULTURE, AND PROTECTION©

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There is a common perception that elements of mainstream society are disrespectful of Aboriginal culture. This article argues that developments in the law offer promise for the protection of Aboriginal "intellectual products," manifestations of Aboriginal culture reflecting their world-view. What Aboriginal peoples would like to see protected, however, are not so much words, pictures, or acts but rather the values, beliefs, and principles that give these meaning. Such, the author argues, are best protected by mechanisms internal to Aboriginal communities. Furthermore, the lack of such mechanisms would not justify the intrusion of Canadian law, but rather raises a call within Aboriginal communities to return to traditional means of controlling traditional knowledge and culture. The challenge will be to fashion these tools to meet contemporary demands.

Il y a une perception générale que les éléments de la société dominante sont irrespectueux envers la culture aborigène. Cet article soutient que des développements dans la loi promettent la protection de la "production intellectuelle" aborigène, manifestation de la culture aborigène reflétant leur vision du monde. Ce que les peuples aborigènes aimeraient voir protégé, pourtant, ce sont moins les mots, les illustrations ou les actes, que les valeurs, les croyances, et les principes qui leur donnent un sens. Tout cela, selon l'auteur, serait mieux protégé par des mécanismes internes des communautés aborigènes. En plus, l'absence de tels mécanismes ne saurait justifier l'instruction de la loi canadienne, mais provoquerait plutôt un appel au sein des communautés aborigènes pour retourner aux moyens traditionnels pour préserver les connaissances et la culture traditionnelles. Le défi serait de façonner ces moyens pour les adapter aux besoins contemporains.

* Assistant Professor, Osgoode Hall Law School, York University. The thoughts expressed in this article developed out of discussions I have had with many individuals over the last few years. I do not claim, however, that the conclusion I reach would be respresentative of any group of people. The penultimate draft benefited greatly from comments and criticism generously provided by Brian Slattery of Osgoode Hall Law School. I am responsible for all remaining deficiencies.

I. INTRODUCTION

One can wander over the landscape of Canadian jurisprudence without coming across landmarks meant clearly to point the way to an understanding of the place of Aboriginal cultural property in the legal framework. This claim might seem odd, since over the last few years landmark decisions have come down from the highest court in the land on the very issues of the nature of, and protection to be accorded to, Aboriginal rights. These decisions have been couched in terms of Aboriginal culture and practice.[1]

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[1] In reverse chronology the decisions are: *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*]; *R.* v. *Adams*, [1996] 3 S.C.R. 101 [hereinafter *Adams*]; *R.* v. *Côté*, [1996] 3 S.C.R. 139 [hereinafter *Côté*]; *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*]; *R.* v. *N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R.* v. *Gladstone*, [1996] 2 S.C.R. 723; *R.* v. *Pamajewon*, [1996] 2 S.C.R. 821; *R.* v. *Nikal*, [1996] 1 S.C.R. 1013 [hereinafter *Nikal*]; *R.* v. *Badger*, [1996] 1 S.C.R. 771; *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*]; and *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 [hereinafter *Sioui*]. Leading into, and in some instances informing, the landmark decisions of recent years are a coterie of cases, including, *inter alia*: *Calder* v. *British Columbia (A.G.)*, [1973] S.C.R. 313; *Baker Lake (Hamlet)* v. *Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.) [hereinafter *Baker Lake*]; and *Guerin* v. *R.*, [1984] 2 S.C.R. 335 [hereinafter *Guerin*] (in the context of spelling out the legal status of Aboriginal rights these cases, as important as they are historically, play supporting roles).

While the *Delgamuukw* decision might seem to be the most far-reaching and visionary of the recent judgments, it plays only a peripheral role in the discussion in this article. In this decision the Court made it quite clear that jurisprudence on Aboriginal rights will fall into two fairly distinct categories—decisions which focus on Aboriginal rights as they exist more or less independent of concerns over Aboriginal title to tracts of land, and decisions which focus fairly exclusively on the question of Aboriginal title. The split can be read out of the following passage, at 1080:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather they are parasitic on the underlying title.

The possibility that Aboriginal rights could exist independent of claims to Aboriginal title was accepted in *Van der Peet*, at 511, and subsequently adopted in *Côté* and *Adams*.

The apparent oddity begins to be resolved once it is recognized that, wording aside, these decisions do not actually touch on the protection of Aboriginal *culture*, but rather the protection of Aboriginal *activities*, such as fishing in particular places, at particular times, by particular individuals or groups, for particular reasons.[2]

This sort of protection does not, and is not meant to, address the issue of the protection of Aboriginal culture, and so does not touch on the protection of Aboriginal cultural property. Aboriginal culture finds, at most, *indirect* expression in such activities. If we were to try to locate direct manifestations of Aboriginal culture we would do much better to look at such expressive activities as storytelling, music and dance, visual arts, dramatic presentations, rituals, ceremonies, and—more recently for indigenous cultures of the world—writing.[3] These latter cultural manifestations we might term the *intellectual products* of an Aboriginal people.[4]

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[2] To see that the focus in recent decisions has been on Aboriginal activities, note that, by and large, they concern fishing, hunting, and, to a somewhat lesser degree, gambling. This pattern can be accounted for by pointing out that these activities are central to the lives of Aboriginal peoples. My claim is not that these are not Aboriginal practices integral to the lives of Aboriginal peoples, but that the courts focus not on their spiritual or cultural foundations in Aboriginal culture, but on their simply being "traditional" (*i.e.*, long-standing and important) practices, one stamped by, and so identifiable through, their peculiarly Aboriginal form. This can be seen from Cory J.'s acceptance in *Nikal*, *supra* note 1 at 1056 (citing *R.* v. *Nikal*, [1991] 1 C.N.L.R. 162 at 167 (B.C.S.C.)), of a finding of the Summary Conviction Appeal Court judge concerning the description of the right at issue. The judge below had found that

> the [A]boriginal right includes the right to choose the period of time, whether early in the year when the ice is still in the river, or after the end of August, up to a date in September, when steelhead are normally taken, the right to select persons intended to be the recipients of the fish for ultimate consumption, the right to select the purpose for which the fish is to be used, that is, for food or ceremonial or religious purposes, and the method or manner of fishing … .

Cory J., at 1057, added one qualification:

> [T]he selection of the ultimate recipients of the fish is not an unqualified right. Rather, the evidence adduced went no farther than establishing that the appellant as a Wet'suwet'en had the right to provide to other members of the band those fish that are necessary for their personal and ceremonial needs.

[3] This is not to say that fishing could not be construed in a way that made it culturally expressive. But while the courts explore the notion of culturally expressive fishing practices primarily in terms of "practices" (*i.e.*, in terms of the use of certain types of nets, with certain techniques, at certain times of the year, etc.), to understand fishing as a cultural practice one would need to concentrate on the relationship between the practice of fishing and the fundamental beliefs that underscore Aboriginal culture, beliefs which, once again, find their most direct expression in ritual, music, ceremony, and narrative.

[4] Terminological issues arise at several points in this discussion. Here, it needs to be made clear that in the use of the expression "intellectual products," I chose a term that, I believe, has some carry-over to the context of intellectual property as it exists as a subject in domestic Canadian law. But to speak even of "products of the intellect" may be problematic from a traditional

I wish to go further, however. While it would be better if we are to address the issue of the protection of Aboriginal culture to focus our attention on such products of Aboriginal culture, this would mean focusing on activities that are, at most, *manifestations* of Aboriginal culture. Such activities as storytelling, music and dance, dramatic re-enactments and presentations, carvings and paintings, rituals, ceremonies, and the content of the stories, songs, dances, and ceremonies, touch more directly on—as more or less transparent expressions of—that which an Aboriginal people would identify as what is valuable or essential to their self-identity.[5] But as such they do not themselves, by themselves, comprise the culture of a people. What may be directly touched on by such activities—what I will refer to throughout the rest of this article as "Aboriginal culture"—are the *values*, *principles*, and *beliefs* that *inform* the physical manifestations, which *give* them meaning, truth, and validity (if only to the people who live through these meanings). These sources of meaning are what are seen and felt by Aboriginal peoples to be worthy of protection, as the "cultural property" that they wish to have respected appropriately in regard to its preservation, development, and transmission.

One aim of this article will be to argue that while the current status of Aboriginal rights under Canadian law is primarily focused on the protection of Aboriginal *practices* or *activities*, the protection of the intellectual products of Aboriginal peoples *has* been made available, if inadvertently. Somewhat paradoxically, however, the main thesis of this article is that this is not necessarily a positive outcome for Aboriginal peoples.

Aboriginal perspective. From such a perspective the "self" is typically not seen as a reflection of an almighty God (and so capable of free creation in the spirit of an omnipotent being), but as a nexus in a web of being, capable of creation only because of its interconnections with all of reality. Nothing, on this model, is ever solely the creation of the atomistically defined individual artist or intellectual, for the inspiration comes from the world around, the skill is courtesy of gifts from various spiritual sources, and the resources to work on the project are made available by the community and the world around.

To speak, then, of intellectual products that require protection from outside intrusion is only to speak of particular manifestations of culture, the songs and stories, the paintings and ceremonies. It is *not* to suggest that they might be worthy of protection because they are *owned* (by virtue, say, of some form of a Lockean conception of property) by either the individuals that make up the community, or the community itself (which might be suggested if we were to suppose that they see *themselves* as the *source* of these products). It would be better to think of the products as being made *through* the work of the community, the value in their protection lying in their value to the community as expressions of sacred teachings about core values and beliefs.

[5] To say that these are "more or less" transparent expressions is to acknowledge that different people, in different circumstances, will have greater or lesser facility in discerning the messages transmitted through these activities.

First, the deeper defining elements of an Aboriginal world—the values, principles, and beliefs that go into the self-identification of a people, which form their intellectual and spiritual inheritance—are such that protection provided by Canadian sources is both *unnecessary* and *unwanted*. Aboriginal peoples are capable of providing the mechanisms called for, and they must be left to develop the same. Second, protection from Canadian sources would be *inappropriate*, for it brings with it the baggage of a Western conception of cultural property and would thereby hinder progress towards appropriate Aboriginal control over a matter that must be regulated by the people whose culture requires protection.[6]

While this article concludes with an examination of Aboriginal rights at Canadian law *vis-à-vis* the protection of Aboriginal intellectual products, the reader must keep in mind that the fundamental issues addressed in this article concern the degree to which the recent

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[6] The only potential benefit that might flow from Canadian legal protection of Aboriginal intellectual products would be realized if such protection served as one element going into a program designed to protect and promote those conditions which themselves assist in the transmission of a culture from the elders to the young. Even so, this protection may not be required (and certainly would not be as important as measures to counteract the myriad assimilationist techniques and policies brought to bear over the last few centuries—counteractive measures such as the protection of the integrity of Aboriginal languages, and efforts to raise communities out of the social and economic quagmires in which they often find themselves).

See United Nations, Commission on Human Rights, Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, UN ESC, 45th Sess., Agenda Item 14, UN Doc. E/CN.4 Sub.2/1993/28 (1993) [hereinafter *Cultural Study*]; and United Nations, Commission on Human Rights, Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN ESC, 45th Sess., Agenda Item 14, UN Doc. E/CN.4/Sub.2/1993/29 (1993) [hereinafter *Study*], cited in D. Suagee, "Human Rights and Cultural Heritage: Developments in the United Nations Working Group on Indigenous Populations" in T. Greaves, ed., *Intellectual Property Rights for Indigenous Peoples: A Sourcebook* (Oklahoma City: Society for Applied Anthropology, 1994) 193.

In his comments on the *Study*, Suagee notes, at 202-03 [emphasis in original]:

> [T]he *Study* concludes that the most effective protection is for indigenous peoples to be able to control their own territories. …
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> In a more fundamental sense, the *Chairperson's Study* challenges the premise that intellectual property rights law offers an appropriate legal framework for protecting indigenous cultural knowledge and suggests that using the concept of intellectual property transforms knowledge into a commodity that can be bought and sold. The *Study* concludes that … the basic philosophy behind these mechanisms [copyright and patent law] conflicts with the philosophy of most indigenous peoples towards their cultural knowledge.
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> …
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> The *Study* says that most indigenous peoples do not regard their heritage in terms of *property* but rather in terms of individual and community responsibility, and that heritage is more appropriately seen as a bundle of relationships rather than a bundle of economic rights.

jurisprudence intersects with the issue of protecting the defining elements of a culture, and the impact this has on the general issue of *appropriately* protecting the intellectual products of Aboriginal peoples. This issue is resolved when we look closely at the sort of protection Canadian law can afford, and consider this in relation to the truly valuable elements of an Aboriginal world.

The examinination of the promise Canadian legal protection holds for Aboriginal culture commences in Part III. We will examine at that point the means by which the courts have recently set to the task of defining and protecting Aboriginal rights. Once this is complete we can then determine the extent to which these means can be employed in the task of protecting Aboriginal culture. But before launching into a discussion of the judicially-determined status of Aboriginal rights, further preparatory remarks are in order.

In particular, three things need to be discussed: first, the nature of the relationship between the *values*, *principles*, and *beliefs* underlying traditional practices and the intellectual products of a people, so that we might see the nature of interest that Aboriginal peoples have in these matters; second, the place of the concept of property in Aboriginal culture; and finally, the concepts of tradition and change in contemporary Aboriginal society and their relation to the resurgence in Aboriginal self-governance. Only then can we begin to appreciate the issues around the protection of Aboriginal culture, and the *proper* role the Canadian judicial system can play in this regard.

II. REMARKS ON CULTURE, PROPERTY, AND AN ABORIGINAL PERSPECTIVE

A. *A People's Story: The Issues*

I wish to make use of a hypothetical situation, one in which we suppose that a particular Aboriginal community has an interest in having outside forces respect its assertions of control in relation to a particular narrative. For the sake of discussion let us pick out, in relation to this hypothetical community, what is referred to by Western scholars as a "creation story."

The telling of this sort of narrative is often surrounded by the sorts of community controls that correspond, functionally, to some of the mechanisms in place in Canadian law for the protection of intellectual property. While these controls will vary from community to community in regard to such details as who may be regarded as proper vehicles for

the transmission of the narrative, on what occasions this narrative may be appropriately told, and what audience the narrative, in its proper telling, may be aimed towards, generally Aboriginal peoples had, and continue to employ, what can be termed "institutional" tools in place to regulate such matters.[7]

What, one might ask, could Canadian law add to these community-based structures? The problem, some might suggest, comes from the fact that these controls have their origins as internal controls. They developed out of a need to self-regulate the production and transmission of cultural property within the community. These community-based controls cannot, then, adequately deal with outsiders who might wish to try to "capture" the narrative in question, taking it away to serve their own ends.[8] What Canadian law *could* provide would be the supplementation of these Aboriginal institutions with mechanisms intended to prevent outside forces from making any unauthorized use of this, or any other, intellectual product. Just what these mechanisms might look like is not clear, but presumably some form of protection

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[7] My basis for making this claim comes primarily from personal experience, in talking and living with the Anishnawbe of Northwestern Ontario, for an all-too-brief period of time. My own people, the Inuit, have these controls, but in living down south I have had even less experience in relation to them. See further P.V. Beck & A.L. Walters, *The Sacred: Ways of Knowledge, Sources of Life* (Flagstaff: Navajo Community College Press, 1992), especially c. 3, 5.

See A. Ranker (Makah), "Knowledge is Not Available to Just Anyone" in A.B. Hirschfelder, ed., *Native Heritage: Personal Accounts by American Indians, 1790 to the Present* (New York: Macmillan, 1995) 125, where the author explains the mission and policy of the Makah Cultural and Research Center:

> As a cultural institution, we would make a big mistake if we start to institutionalize and make decisions for the families who are the traditional units of government in the Makah community. We make sure, when it comes to this kind of information [traditional knowledge], that the rights of dissemination and access remain with the families and remain with the elders. Our elders are not afraid of death. What they are afraid of is having their words and things used wrong later on.
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> In our case, in Makah country, knowledge was not available to [just] anyone. And it was not available to everyone. And that's the way its been since the beginning of time. … We feel it is not our responsibility to change that system. … In the Indo-European community, many people believe that the person that writes the information down owns the information. In our case that is not correct. It's the person who speaks the information that has control over that information.

[8] One might locate the problem not merely in the infiltration into the community of external forces, but (in this case) in the nature of the intruders, with the dynamic that arose out of the fact that the communities, at least in the earlier stages of contact, had little concept of the business of business. The problem today, then, would not be that community-based structures *per se* cannot adequately deal with outside forces, but that Aboriginal communities have been—and in some cases continue to be—structured in such a way that outside commerically-minded forces can easily exploit the situation with little likelihood of retribution.

could be negotiated and implemented.[9] A prohibition against the unauthorized use of central elements of the culture, such as the creation story, would undoubtedly form part of such a structure.

Should the various controls in place within an Aboriginal community be regarded in Canadian domestic law as worthy of sanction through the general sort of supplementation imagined? We can look at this claim from two directions, asking whether from within Canadian jurisprudence any justificatory room for the protection of such traditional controls can be found, *and* asking if Aboriginal communities would have any *need* for whatever protection Canadian law could provide.

We will explore the former question in the third section of this article. We can use the latter question as a springboard for getting into the issue of the relation between the intellectual products of an Aboriginal community and the values, principles, and beliefs that ultimately define and determine the culture of the community. This in turn facilitates an investigation into the question of where Aboriginal peoples locate value in relation to their cultural property.

B. *A People's Story: Property?*

It must be made clear that it is not necessarily important to the Aboriginal community that the creation story be protected so that some individual member(s) or sub-group of the community can enjoy the protection of their "property interests." This would be to suppose that there existed some sort of an "object," possessing either intrinsic or utilitarian value, the value of which (to the owners) would make it

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[9] In the United States, protection of Native American cultural property has been ostensibly provided by several pieces of legislation. In 1990, the United States Congress overhauled the *Indian Arts and Crafts Act of 1935*, 25 U.S.C. § 305-305c (1994), the aim being to revamp legislation aimed at protecting what I have referred to as intellectual products (though the focus of this piece of legislation is, as the title suggests, somewhat narrower). For a discussion of this renewed legislation, see R.A. Guest, "Intellectual Property Rights and Native American Tribes" (1995-96) 20 Am. Indian L. Rev. 111; and J.K. Parsley, "Regulation of Counterfeit Indian Arts and Crafts: An Analysis of the Indian Arts and Crafts Act of 1990" (1993) 18 Am. Indian L. Rev. 487. Guest stresses a useful distinction, at 113-14, between cultural property (defined as "historical, archaeological, and ethnographical objects, works of art, and architecture that embody a culture," government regulation of which is essentially protectionist and preservationist), and intellectual property (defined as "novel expressions or embodiments of ideas," government regulation of which is protectionist but for the greater aim of higher productivity in the marketplace of intellectual products).

worthwhile for the community to assert, in relation to it, regulatory control.[10]

While talk of intangible objects is intelligible (these objects, after all, form the subject matter of much of intellectual property law), and while one can go on to construct laws regulating the ownership of such objects for the benefit of certain individuals, nothing like this sort of underlying conceptualization can be found in traditional Aboriginal world-views.

Given social and economic realities all Canadians face, and the particularly bleak nature of this reality for Aboriginal Canadians, it is understandable that there exists in contemporary Aboriginal communities an economically driven need to go along with, indeed, to exploit this way of conceiving of the intellectual inheritance of the community.[11] But this, I would argue, is only carried out in relation to

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[10] To take this approach would be to demarcate the limits of debate about issues surrounding cultural intellectual property with lines linked to economic factors. Of particular interest to some are aspects of traditional Aboriginal knowledge that are potentially lucrative, should they be transferred into biomedical or agricultural industries. For example, there is increasing interest in the traditional plant medicines of indigenous peoples from around the world, with mounting pressure from parties intent on exploring the mass-market potential of these medicines. A debate has developed concerning the status of this knowledge as intellectual property of the communities in which it is found. Illustrative of arguments sympathetic to the claims of indigenous peoples is T.C. Greaves, "The Intellectual Property of Sovereign Tribes" (1995) 17 Sci. Comm. 201. But see A. Stenson & T. Gray, "Cultural Communities and Intellectual Property Rights in Plant Genetic Resources" in T. Hayward & J. O'Neill, eds., *Justice, Property, and the Environment: Social and Legal Perspectives* (Aldershot, U.K.: Ashgate, 1997) 178, for an attack on the claim that indigenous communities have a property interest in this form of traditional knowledge

My aim is not to show that Aboriginal peoples have a claim to intellectual property under Western theories of property. For instance, Stenson & Gray, *ibid.*, examine the two primary arguments a party can offer in support of its claim to intellectual property—an entitlement approach that typically focuses on the *labour* a party has invested in the creation of the thing over which ownership is claimed; and a proximity approach that claims ownership on the basis of the things being in the immediate proximity of those claiming ownership. Rather than engage them about the extent to which Aboriginal communities could meet the requirements of these two approaches in order to justify a claim to intellectual property rights in genetic resources (or over creation stories), I question the need to engage in such a debate. Doing so would be tacit acceptance that such Western forms of justification set the parameters by which debates over cultural property could be resolved. My position is that, in a post-colonial space, other forms of justification—those employed by Aboriginal peoples—must be examined.

Further, conceptually prior to this examination is an even more fundamental issue—the question of the propriety of dealing with such things as traditional knowledge as intellectual *property*, as property is conceptualized in the West.

[11] See *Queeneesh Studios Inc.* v. *Queeneesh Developments Inc.* [1996] 67 C.P.R. (3d) 452 (B.C.S.C.) [hereinafter *Queeneesh*], a case that exemplifies this dominant conceptualization of culture. The dispute involved two commercial bodies that each sought to use the term Queneesh in their names, the defendant being a corporation owned by an Indian Band. The master dismissed the Band's motion to be joined as a defendant in the passing-off action, deeming the Band's

particular remote manifestations of the culture of an Aboriginal group.[12] One would not find, I suggest, that a *traditional* Aboriginal community would ever entertain this conceptualization of culture in relation to those intellectual products that lie close to the "core" of the world-view of this people—what I have delimited with the term *Aboriginal culture*. This core, *traditionally*, would not be available as a commercial product, even to the economic benefit of the Aboriginal community itself.

It will be my aim in Part II (C)-(F), below, to argue for this point. This argument will have several interlocking sub-arguments. First, I will suggest that from an Aboriginal perspective it makes little sense to conceive of the desire to protect the integrity of the creation story and its telling as connected to a property interest. This suggestion will be bolstered by considering and rejecting an argument to the contrary. The argument represents the point of view of those who would argue that Aboriginal peoples employ a conceptual scheme that has room for, and indeed must accommodate, a full-bodied notion of property. Second, we must look at the notion of "tradition." I will argue that far from being a concept used to freeze "authentic" Aboriginal peoples in a "primitive" and romanticized past, this concept is capable of being freely used by Aboriginal peoples at any point in time. Used freely by Aboriginal peoples, the notion of tradition will not aim to capture some sense of pre-contact "pure" Aboriginal culture, but rather will point to an alternative and equally valid mode of conceptualizing, and thereby understanding, the world.

C. *A People's Story: Sacred*

The model of acquisition and control of objects for the sake of the advancement of individual aims and projects—a product of the West in form and substance—means very little when seen through eyes

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proprietary right to the name irrelevant to the action. While the name under dispute in *Queneesh* related to what the Band referred to, at 454, as a "culturally significant legend," the only argument germane to the dispute that the Band could raise (Master Horn rightly concludes) was based in a bare claim to a proprietary right to the word. Had the court been willing to hear the Band's argument on the basis of Aboriginal rights, then, as the master notes, at 456, a whole new can of worms would have been opened up. In such a situation the emphasis would have shifted from the mere word to its relation to the "culturally significant legend." The use of Canadian law to exploit economic interests in Aboriginal "culture" is limited to situations such as these, wherein the thing to be protected is not Aboriginal culture or knowledge *per se*, but Aboriginal artifacts, or mere words, or physical activities and products.

[12] The confluence of this "economic reality" and the traditional conception of the nature of the intellectual inheritance of a community often leads into a debate within the community over the extent of commercialization that is *proper* and that can be carried out *respectfully*

accustomed to an Aboriginal world-view. The interest that a traditional community has in the protection of a core narrative lies in its sacredness, in its role in the greater interconnected life-world of the overall community. Some element in the community will likely have what outsiders may think of as "control" over this legend, having, for example, sole authority to determine when and where this legend is to be told, and by whom—but this is not the sort of control that corresponds to anything like Western-style ownership. Rather, this control comes with responsibilities, and it is the set of responsibilities that are *fundamental.* Ultimately it is the promotion of such values as balance, harmony, and beauty that underscores the models of behaviour evident in traditional communities.[13]

There are those who dub such a view of Aboriginal culture romantic (and by implication false). Brian Crowley distinguishes between two "romantic" and "mistaken" views of Aboriginal culture: on the one hand there is the "naive, romantic view" which "sees property as a classic example of an alien (Western) imposition on native peoples and, therefore, as a key element in the justification for some wholly new institutional arrangement for them."[14] On the other hand there are the "sophisticated proponents of [a] property-based difference" between Aboriginal and Western cultures, those who argue the difference "is not the *absence* of property in the Aboriginal culture but a radical incompatibility in the *meaning* given property in that culture and the culture of the West."[15]

Let us consider the naive romantic view first. Crowley's central argument relies on the interrelationships between the concept of property and such concepts as theft, ownership, slavery, gifts (as exchange), and territory. Since (1) there can be no argument with the historical record, which convincingly details the extent to which Aboriginal peoples worked with and lived by these related concepts; and (2) as a matter of conceptual ordering the latter concepts rely on the more fundamental concept of property; Crowley concludes (3) that the only explanation for the prevalence of the mistaken view that historically Aboriginal peoples had no notion of property is a [romantic] distortion of the nature of Aboriginal belief-structures.

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[13] See Beck & Walters, *supra* note 7; the *Cultural Study*, *supra* note 6; and the *Study*, *supra* note 6, on the protection of the cultural and intellectual property of indigenous peoples.

[14] B.L. Crowley, "Property, Culture, and Aboriginal Self-Government" in H. Drost, B.L. Crowley & R. Schwindt, *Market Solutions for Native Poverty: Social Policy for the Third Solitude* (Ottawa: C.D. Howe Institute, 1995) 58 at 59.

[15] *Ibid.* at 64 [emphasis in original].

As Crowley defines "property" there can be little disagreement with the claim that Aboriginal peoples have employed, both traditionally and in their modern lives, the notion of property.[16] The weakness of any argument that rests on this point is precisely its reliance on this general—and thereby fairly empty—notion of property. If to have the concept of property requires no more than, for example, that one resist the nonconsensual appropriation of the products of one's labour, then granted Aboriginal peoples have always had this concept. Ultimately, however, this means very little. On this level of conceptualization the concept boils down to a functional mechanism required in any system of rules governing the interactions of social beings.[17] If we accept Aristotle's conception of the human as an essentially social animal, then not surprisingly *all* cultures will have a role for this abstract concept of property.

The interesting arguments, then, must revolve around the more sophisticated view of the place of the concept of property in Aboriginal societies—the view that while it is true that Aboriginal peoples have always had some general concept of property, this concept is radically different in kind from the one operating in the Western world. Crowley attacks this position by arguing that, when examining the history of the interaction of Western and Aboriginal peoples, what we see is not a clash between two radically irreconcilable or alien systems of thought, but merely the running together of two stages of economic evolution. The advanced Western world, Crowley argues, passed through an early period during which it was natural to think of property as socially-conditioned (an echo of which is still present in the Western model).

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[16] See J. Borrows, "Negotiating Treaties and Land Claims: The Impact of Diversity Within First Nations Property Interests" (1992) 12 Windsor Y.B. Access Just. 179 at 180, n. 3. First, the author points to the debate over the use of the word "property" in relation to First Nations' understanding of land use. Second, in analyzing the historical development of both treaties and land claims on Manitoulin Island, Borrows notes, at 185, that traditionally "[t]he Odawa and Ojibway had well-developed systems to allocate property between themselves." Citing a number of studies of the systems of allocation historically at play, Borrows paints a picture of an Aboriginal time and place determined by rules which fix the allocation of potentially sparse resources (at 185-86). This illustrates that *all* systems of social ordering will employ a notion of property, once we locate a suitable level of abstraction in relation to the concept.

[17] Assuredly, if you come "out of nowhere" to steal a cache of food I have built up for the benefit of my community, I will consider this inappropriate behaviour, unless, that is, there was already in place a rule governing our situation which translates this "stealing away" into something tacitly consensual. For example, the rule might be: "If you need essential supplies desperately to meet demands of your community, then so long as you do not seriously endanger my community this removal is permissible (for I would be permitted the same if circumstances were reversed)." If this is thereby to conceive of these supplies as "my property," then so be it.

Operating in conjunction with the notion of property were concepts of "stewardship, communitarianism, and cosmic connectedness."[18]

But as the Western world passed through ever more complex stages of growth the gradual development of a "context of scarcity" (created by, amongst other things, population increases made possible by new modes of production) determined that ever more sophisticated conceptions of property were demanded. In particular, it was essential that the notion of private property take hold, for otherwise economically irrational behaviour would destroy the advances made possible through more efficient means of production.[19]

At the time of European contact, Crowley contends, Aboriginal societies were still, by and large, stuck on the primitive hunter-gatherer rung of the evolutionary social/economic ladder.[20] Inevitably, once interaction with European forces had reached a certain point in a certain region of the New World a context of scarcity would develop, and the Aboriginal people in that region would react in one of two ways: they would either continue to operate with primitive notions of "communal property," and thereby destroy their own regional ecology; or they would quickly ascend the evolutionary rungs, and develop their own

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[18] *Supra* note 14 at 67.

[19] See *ibid.* at 66. Crowley appeals to a standard "tragedy of the commons" argument in making this point. See also his remarks on the enclosure movement in Britain, and a more extended discussion, at 71ff., concerning the emergence in the Western world of the concept of private property in concert with the loss of a vision of a "shared, concrete social project." The individualism that Crowley champions in this regard is discussed in Part II(E), below.

[20] This reveals clearly Crowley's lack of historical/geographical understanding. However, for the sake of argument we can limit our discussion to the sub-arctic and North, and press on.

It is interesting to note that Crowley's position has the flavour of one side of a long-standing debate underlying common law jurisprudence on Aboriginal claims to title and rights. The two sides of the debate were ably advanced by Bartolomé de Las Casas and Juan Ginés de Sepúlveda before a junta called by Charles V at Valladolid, Spain in 1550. Since that time there have been those who follow in Las Casas's footsteps, arguing that Indigenous Peoples are in every respect the equal of Europeans, and those who follow in Sepúlveda's footsteps, arguing, on the basis of some neo-evolutionary or religious grounding, that Indigenous Peoples are lower than Europeans on the civilized scale. This debate, and its continuance in contemporary Canadian contexts, is explored in T.R. Berger's *A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992* (Vancouver: Douglas & McIntyre, 1991). While Crowley might appear to be arguing that Canada's Aboriginal peoples are not different in kind from the European settlers, what he is really saying falls in line with new-evolutionaries. Luckily for the Aboriginal peoples of Canada, Crowley argues, they have the capacity to climb the evolutionary ladder, and so reach the vaunted heights first scaled by the true leaders of the human race—the Europeans and their descendants. This is the colonial attitude that Aboriginal peoples must combat.

What is somewhat ironic is that the Aristotelean theory of inferior/superior races of humanity used by Sepulveda has long been discredited, and the scientific theory of evolution does not contain the notion of progress that is implied in Crowley's account.

sophisticated conceptions of private property. Crowley points to studies of the plains bison-hunters (who hunted the bison to near-extinction) to illustrate the former path, and the "beaver-hunting" Montagnais of Labrador (who developed a system of regulated trapping lines) to illustrate the latter.[21]

The conclusions to draw, Crowley argues, are that, first, Aboriginal peoples have always had a primitive conception of property, not unlike that evident in the West in its earlier history; and second, this conception differs only in degree, not in kind, from that which forms a cornerstone of Western law and society today. There is, then, no radical incommensurability between the Aboriginal and Western conceptions of property. Those who would suggest that Aboriginal peoples work with a notion of "communal property" that is alien to the West and its notion of private property are ignoring the history both of the Western world and of the interaction between the West and Turtle Island.

D. *A Reply to the Social Evolutionist*

The sophisticated romantic view does not fall quite as Crowley imagines. A key link in his argument is the claim that natural economic pressures dictate the evolution of the concept of property in societies. This is connected to the claim that Aboriginal peoples, traditionally, lived by a concept of property that reflected nothing more than the primitive economic circumstances by which they found themselves constrained.

While Crowley points out that, economically speaking, Aboriginal societies were by and large efficient, this means very little, he argues, since matters of economic efficiency only become important in the context of scarcity. Crowley quotes Peter Pearse in this regard:

> Where resource values are low and organization costs are high, the system of users' rights is crude, and properly so. But as resource values rise, raising as well the potential gain from improved allocation arrangements, more sophisticated systems of property rights can be expected to emerge. … [At the arrival of Europeans there] was no scarcity in the economic sense and no allocation problem. There was therefore no need for individual property rights.[22]

The problem for Crowley's account (and for those who would agree with any picture grounded in such an historicist fashion), is that it

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[21] *Supra* note 14 at 68-69.

[22] *Ibid.* at 68, citing P.H. Pearse, "Property Rights and the Development of Natural Resource Policies in Canada" (1988) 14 Can. Pub. Pol. 307 at 308.

rests on assumptions about "the good life" which, once brought to the surface, shows the argument in its true Eurocentric glory. To reveal these assumptions one need only ask whether it is inevitable that, in order for an Aboriginal people to survive, its conceptual framework must develop along a path destined to incorporate an essentially individualist private property regime.

On Crowley's account, recall there are only two possible outcomes for an Aboriginal society as it copes with the demands of interacting with the Western world—either economically irrational behaviour that leads inevitably to economic destruction, or the rapid shift to a conception of property that accords with the Western model. But why, one might wonder, must the Aboriginal world be conceived of as limited to these two possibilities? Is it not conceivable that an Aboriginal society could continue to live as it has since "time immemorial," developing, so to speak, on its own terms?

Crowley's imagination is limited not by the notion that the situation admits only of irrational behaviour or realignment with models centred on individual rights, but by the inability to imagine that Aboriginal peoples could have been left alone. Why, one might ask, is it assumed that Aboriginal peoples will be forced to react, for example, to the introduction of new modes of production, to new technologies, and to new systems of resource allocation and distribution?

There is certainly an argument available to support the claim that Aboriginal peoples had only the two paths to follow. It would be completely implausible to imagine, one might argue, that faced with the intrusion of Western influences an Aboriginal people could simply maintain its organizational structures, complete with reliance on the social ordering intertwined with a communal property regime. The implausibility, one might add, is clear from a cursory glance at the history of the various dynamics that ensued between Aboriginal societies and Western forces.

But such an argument misses the point of the objection. Granted, Aboriginal peoples historically reacted either by (a) suffering from a mismatch between the traditional communal property-regime and changed social/economic/technological conditions, or (b) adopting a property regime not unlike that operative in the West—but the issue is whether this *had* to be so. The reason one cannot find a history of a people able to remain completely rooted in its traditional world-view while avoiding over-exploitation of resources, and the ensuing devastation that would entail, is that there is no history in Canada of a people being accorded the sort of respect that translates into tolerance for their way of life. The "inevitability" in Crowley's argument, then,

translates into the "inevitability" of Western advances and impositions—hardly the sort of inevitability needed to uphold an argument which purports to detail the advance of economic systems from "primitive" to "modern."

E. *Conditions of Choosing vs. Conditions of Sharing*

A section of Crowley's article might seem to defuse some of the power of this line of attack. In concert with the development of new economic realities that push Aboriginal societies into either self-destructive behaviour or development of more sophisticated conceptions of property, Crowley argues, is the developing realization on the part of Aboriginal peoples that both the Aboriginal model of social structure and the theory upon which this rests are inferior to those offered by the West.[23]

Aboriginal societies, Crowley argues, were historically organized around what he terms "conditions of sharing" ("the obligations that members of the group must meet in order to be entitled to a share in its resources"[24]), while "modern Western society" has moved to an organizational structure informed by "conditions of choosing" ("the obligations all individuals must respect if they are to be left alone to pursue their own vision of the good life"[25]).

Between these two, Crowley goes on to argue, the latter is preferable, for a system built on a foundation determined by conditions of sharing can only be justified in contexts where no experimentation with alternative forms of life exist. One consequence of the evolution of the Western world was its movement into structures dictated by a growing adherence to the notion of free individual choice, and an inevitable consequence of the interaction of Aboriginal and Western peoples is the realization by Aboriginal peoples that an alternative form of life—one which will allow them freedom of choice—exists.

Once this realization takes hold, Crowley suggests, it is no longer valid to conceive of Aboriginal communities on the basis of conditions of sharing, for from that point on the free choice of the individual members of a community must be called on to justify the existence of the people as a people. Crowley makes this point:

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[23] This developing realization need not be conscious. The superiority of the Western system need only be self-evident, and human nature would take over from there.

[24] *Supra* note 14 at 73.

[25] *Ibid.*

> Western society and its institutions—in particular, the institution of property—allow many different life and community projects to co-exist, so long as they do so peacefully. Communities based on communalism, sharing, and unity with nature … are welcome as long as they do not require others to subsidize their way of life and as long as all the participants are there *voluntarily*. … What cannot be accepted is the subjection of people to the demands of … a community [organized on communitarian grounds] merely because they happen to have some common objective characteristic such as race, language, or class.[26]

He goes on to note that historically: "One consequence of [A]boriginal contact with European cultures was to introduce choices that had been inconceivable before. … The shift from social relations based on status to those based on contract was under way."[27]

The notion seems to be that, once exposed to the conditions of choosing, there is no going back—Aboriginal peoples, as peoples, will now be judged according to the choices they, as individuals, will make. Once the homogeneous form of traditional Aboriginal existence intersects with the modern world, an Aboriginal community can no longer be justified on the basis of its being built on a bedrock determined by a common project, for now the only acceptable form of justification demands that it be built on a bedrock determined by individual choice (which may *then* legitimate any communal project which could animate the community).

Since *this* sort of *inevitable* shift in outlook goes hand-in-hand with the movement from primitive notions of communal property to modern notions of private property the fate is sealed for non-Western modes of existence. In seeing oneself now not as fundamentally community-determined, but rather seeing the community determined out of the fundamental interests of individuals, people *become* the sorts of "social beings" best suited to conceive of the products of their labour as properly theirs over which to claim ownership. In so conceiving of themselves such people are equipped to advance "sophisticated" property claims against any who might move unwanted into their sphere of control.

This sort of argument will not, however, rescue Crowley's general position. My thesis, recall, is that the manifestations of Aboriginal culture are deemed worthy of protection traditionally on the

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[26] *Ibid.* at 75-76 [emphasis in original]. This passage also suggests an alternative reading of Crowley's argument—that he is suggesting no more than that the powers-that-be in the West would not and will not accept the organization of a community on communitarian grounds, as if this is somehow simply and irreducibly evil. Rather than imagine such a weak attempt at argumentation, I choose instead to read into this section a bit more than might appear clearly and distinctly.

[27] *Ibid.* at 76.

basis not of some property interest that would entail these intellectual products be conceived of as objects belonging to owners in the community, but rather on the basis of their sacredness. Crowley's argument can be put simply in this form: 1) Traditional pre-contact Aboriginal societies worked with notions of communal property. 2) Within these organizational structures some shared end ultimately dictated the outcome of property questions and disputes. A commonly held vision of a shared end would, for example, determine the relationships between individual members of a community and a particular story. 3) As a result of the interaction of Aboriginal societies and the Western world, notions of communal property were inevitably superseded by conceptions of property that categorize such things as stories as objects to be governed by private property regimes. Even if it were not the case that the West forced itself on Aboriginal societies (so that we might imagine that Aboriginal societies could have continued to employ an economic system matched to their economic circumstances), the mere meeting of such forms of life meant that the Aboriginal societies were bound to change.

The upshot of this line of reasoning is the notion that an Aboriginal community would inevitably come to see its own intellectual products in a Western fashion. This, as Crowley notes, does not necessarily mean that it would come to think, for example, of stories as owned by individuals within the community, but it would mean that *in relation to other communities* it would have to adopt a Western stance. The community would inevitably come to assert: "We claim exclusive ownership over these stories, such that they are *our* property, no one else having the right to possess or use them for any end not approved by us."

But the mere fact that Aboriginal communities will adopt this stance is compatible with another, and I would argue equally plausible, explanation of the actions of contemporary Aboriginal communities. This alternative explanation relies on a picture of Aboriginal communities as still connected to their traditions, and as "closing the circle," returning ever closer to their roots in a non-Western vision of the world.

Let me grant, first, that conceiving of intellectual products as "owned" by the community is a stance some Aboriginal peoples take with respect to their intellectual inheritances. But we need to consider in this regard their reasons for doing so—they may not necessarily be as Crowley envisions. An Aboriginal community may reason that to exist peacefully with other forms of life, to settle disputes, to operate efficiently, it needs to work with the "sophisticated" notion of property. Since the Aboriginal community cannot act as if other communities will

treat its intellectual inheritance respectfully, it must assert publicly a property interest. This is, however, entirely consistent with a traditional Aboriginal perspective, for the Western intellectual property rights regime is simply being used as a shield to protect what cannot otherwise be protected.

The Aboriginal community can continue to think, then, of its intellectual products as sacred—as entailing responsibilities, not rights, as not owned, or capable of being owned, by anyone—and yet use the Western system as a means to further their ability to continue to think of its inheritance in this way.[28] The Aboriginal community continues to see itself as asserting control over its collective inheritance, but only to further the end of protection against outside forces, warranted by its vision of the nature and proper place of both its sacred knowledge and the intellectual products that flow from it.

F. *"Tradition"*

The last few sections have made key use of the term "traditional," a term often treated with some suspicion.[29] Much as labels such as "Aboriginal" or "Native" are argued by some to be products of an "outsider" epistemology, the term "traditional" is argued by some to be merely another "political weapon."[30] This term is used, some suggest,

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[28] I am not suggesting that all Aboriginal communities reason this way. But I would suggest that one consider this possibility before claiming that it is otherwise. The situation may be significantly more complex than those who fall in Crowley's fold have imagined.

[29] The debate about the use of this term has some parallels and linkages to a current debate about such terms as "Aboriginal" and "Indigenous." See, for example, S. Wright, "Intellectual Property and the 'Imaginary Aboriginal'" in G. Bird, G. Martin & J. Nielson, eds., *Majah: Indigenous Peoples and the Law*(Annandale, Aust.: Federation Press, 1996) 129. An interesting look at the use of the term "Indian" from an Aboriginal perspective can be found in Dennis McPherson's contribution to D.H. McPherson & J.D. Rabb, *Indian From the Inside: A Study in Ethno-Metaphysics*(Thunder Bay: Centre for Northern Studies, Lakehead University, 1993) c. 2. An outsider epistemology, some argued, leads to fictions generated by the dominating or colonizing forces as they turn their uncomprehending gaze upon peoples they would rather control than understand.

[30] During the academic years 1994-95 and 1995-96 I was involved with a course in Aboriginal culture at Lakehead University (through the Department of Indigenous Learning). In struggling with the nature of my involvement with such an enterprise, I slowly came to see my "best" role to be as a facilitator of "cooperative" courses, wherein the class, myself included, could work with issues as a group. We often returned to the issue of "tradition," a troubling concept for many who, like myself, have little of the traditional means by which to grow intellectually, emotionally, spiritually, and mentally, as Aboriginal individuals. I would not say that any one person in those two classes would say exactly what I have to say on the subject—I take responsibility for all mistakes. A taste of the discussions that ensue on this point can be found in G.R. Alfred, *Heeding the Voices of Our*

to generate a false idealized notion of some attribute we can apply to various "authentic" elements of Aboriginal society. So one hears talk of a "traditional" pipe ceremony, a "traditional" story, a "traditional" elder, all the while imagining that something substantive is being said about the pipe ceremony, the story, and the elder.

This, some argue, is to pick out certain features present in the ceremony, the story, and the elder, and elevate them to a misplaced prominence.[31] What exactly does the story (or the ceremony, or the elder) exhibit such that we can say that it is traditional, while a similar story with, say, Christian overtones is classified as non-traditional?[32] Further, in this time and place, with Aboriginal communities living in and through varying degrees of mixture with Western culture, what could possibly *count* as traditional?

Some would go so far as to challenge the Western scholar, arguing that the very dichotomy between "traditional" and "modern" reveals a Western conceptualization of Aborginal peoples which would not be forthcoming from Aboriginal communities themselves.

Do Aboriginal peoples object to the act of classifying in line with categories determined by the traditional/modern dichotomy? This cannot be so, for Aboriginal peoples do so too, and the struggle to reinvigorate traditionalism illustrates this process of classification.[33] Perhaps, then, the objection is to mistakes made by non-Aboriginals in their attempts to delineate the traditional from the modern. This undoubtedly constitutes much of the problem as seen from the Aboriginal perspective, but it does not reach down to the deep objection to the classificatory process—that it is a component of a dis-empowering

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Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism (Toronto: Oxford University Press, 1995) at 121-28.

[31] A related concern in this context is that by employing such a concept one may be introducing an essentialist conceptualization of Aboriginal cultures which is both false and dangerous. One outcome of such a conceptualization, those who find such a model dangerous argue, is that a contemporary people, insofar as they do not live up to the idealized features that combine to define the "traditional" Aboriginal community, are as non-Aboriginal as someone born and raised a Scot. Such a concern is misplaced, for an essentialist conceptualization is forthcoming that need not carry with it the notion that certain defining features of a culture make up a core of identity which, once lost, spells the demise of the "traditional" form of that people. This is the sort of conceptualization I sketch out in the rest of this section.

[32] Furthermore, why is this classification done by Western scholars? What is the ultimate *purpose* of this classification process? How can a Western scholar presume to know an Aboriginal society so well as to be able to claim that a certain story is traditional, while another is non-traditional?

[33] See Alfred, *supra* note 30.

regime of interpretation, what some term an "interpretative monopoly."[34]

It is mostly irrelevant whether the classificatory attempts by non-Aboriginals hits the mark, whether the lines between traditional and modern were laid out appropriately—the concern is with the process being done from the outside, with the loss of self-identity that follows from the notion that someone else has the power to determine essential features of one's own identity.

Tied into this concern over dis-empowerment is the feeling that those who would do so are immensely disrespectful of those they turn their classificatory mechanisms upon. The problem, then, arises out of the hubris of the Western colonizer. This colonizer has the arrogance to argue (or merely presume) that the Western conceptual scheme is privileged, that out of all the ways of "cutting up" the world he does so in such a way that he either gets to, or has the best chance of getting to, the Truth about the world.

The real danger in using such language as "traditional" and "modern," then, is in its being used by the outsider to overlay another set of meanings, ones that *may or may not* correspond to "the way things are" (where here I leave open that there might be a way things are *objectively*, which is approached to a lesser or greater degree by conceptual schemes).

I use the term "traditional" believing that, used from the perspective of a Western conceptual world, it obscures or confuses the way things are. The real problem, however, is with the lack of any serious attempt to consider, by those who wish to use such terms, the possibility that they might be contributing to confusion and/or obscurantism. Once one recognizes this as the problem, one can begin to wonder whether there is not some variant of "traditional" (and its usual contrast "modern") which is present in the conceptual scheme of *Aboriginal peoples* This is a fairly simple matter to investigate—one need only talk to Aboriginal people.

Western scholars need to simultaneously (a) avoid colonialist treatment, while (b) allowing Aboriginal peoples the opportunity to explain that they might employ, in certain situations (though perhaps for different reasons), much the same distinctions the colonialist would propound. In particular, use of the term "traditional" by Western scholars may indeed be problematic, not because it imposes on

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[34] See M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretative Monopolies, Cultural Differences" (1989-90) Can. Hum. Rts. Y.B. 3; and "Home/Land" (1991) 10 Can. J. Fam. L. 17.

Aboriginal peoples an instance of colonialist conceptualizing, but because those wishing to avoid the imposition are then blinded to the possibility that Aboriginal peoples themselves may wish to *freely* use such a concept, and perhaps in much the same way that Western scholars employ the term.

Let me suggest, then, that to say that a particular legend is "traditional" is not to say merely that it embodies, or is capable of transmitting, certain concepts which are part and parcel of the Aboriginal conceptual scheme in place *prior to contact* (though saying this captures some aspect of what it is for a narrative to be classified as traditional). Rather, the key point is that this legend expresses the sort of *value-laden* principles and beliefs that underlie *timelessly* the non-Western Aboriginal world-view.[35] To put it this way reveals, among other things, that a legend could be dreamed tomorrow that is as "traditional" as any passed down before contact. It also lays bare the existence not of some sort of chasm between "traditional" and "modern," as these terms are wont to be used by Western scholars, but of a spectrum lying along the line of analysis laid out by these terms.

One can speak, then, of a modern retelling of a traditional legend, and enter into a discussion of the extent to which it is modern and traditional.[36] It will be traditional to the extent that the modern retelling still captures and expresses the values and beliefs embedded in—and grounding—a non-Western Aboriginal world-view. It will be "modern" to the extent that it interweaves into the traditional narrative

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[35] Once again, I cannot provide much by way of documentary support for this suggestion. A number of people have expressed something like this notion in conversation. What comes across clearly is the idea that what is traditional in the Aboriginal context is not what is "old" or "archaic," "primitive" or "arrested," but rather what is timeless. The trick is to convert the timeless core, via a contemporary expressive form, into a message understandable at this time and place.

Thoughts that run parallel to these are expressed in several passages in J. Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629. See in particular comments, at 646-49, concerning the source of First Nations Law in stories that "represent the accumulated wisdom and experience of First Nations conflict resolution. … While the timeless components of the story survive as the important background for the central story, its ancient principles are mingled with the contemporary setting and with the specific needs of the listeners."

[36] In this discussion I often use the terms "Aboriginal" and "traditional" synonymously (and likewise with "Western" and "modern"). This is, of course, poetic—the identification and juxtaposition being employed for the sake of discussion. There is also the traditional Western perspective and the modern Aboriginal perspective. What I am trying to say, however, is that many modern "Aborigines" (especially those, like myself, educated—perhaps too highly—in Western institutions) are interested in the "traditional" Aboriginal perspective, the one *free of Western taint* in hopes of finding there a set of underlying values and principles by which to structure one's life in a meaningful form. In this way we self-consciously accept the divide between Aboriginal/traditional and Western/modern—aware that we ourselves live much of our lives through the Western/modern mode.

such things as Christian themes. To the extent that "traditional" Aboriginal values and beliefs intersect with "modern" Western values and beliefs we would say that it does not really matter that the retelling takes place in this time and place.[37]

It is my contention that the traditional Aboriginal perspective is engaged in an intricate dance with the modern Western perspective, neither perspective dominating. For Aboriginal peoples the project is to nurture the core of timeless principles and beliefs, while continually designing and refining tools to protect their ability to continue as the peoples they have been since time immemorial.

In particular, it would seem that the treatment a traditional Aboriginal community would give to what the West defines as "intellectual property" is founded on, and so only understandable from, principles and values distinct from those offered by the Western world-view. In this regard I agree with David Vaver when he states:

> [Intellectual property] is founded on a modern emphasis on the individual and individual rights, and on encouraging and celebrating creativity and innovation as paths to both self-fulfillment and social advance. By contrast, Eastern and traditional cultures that emphasize social obligation, submersion of the self, respect for tradition, and the replication of traditional forms and themes provide inhospitable soil for Western conceptions of intellectual property.[38]

This discussion, however, is not focused on the "fit" of Western conceptions of intellectual property to traditional cultures. It is time now to turn to the question of the extent to which the judicially-determined conception of Aboriginal rights (as protected under section 35(1) of the *Constitution Act, 1982*[39]) can be brought in to protect what I have suggested determines traditional Aboriginal culture. What is important to bear in mind is that the traditional Aboriginal world-view may be constructed on the basis of values and beliefs that make protection from the outside (for example by the usual Western tools of copyright, patent, and trademark) both inappropriate and misguided.

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[37] This is to oversimplify somewhat, for the fact remains that in this time and place the audience will be, typically, "non-traditional," whereby this means that they live their narrative lives by values and beliefs which are rooted more in the Western point of view. As I noted earlier, to be honest, many, if not most, Aboriginal people (especially the young like myself) lie along the spectrum more towards the "modern." A cultural renaissance has, however, been building in strength over the last few decades.

[38] D. Vaver, *Intellectual Property Law* (Concord, Ont.: Irwin Law, 1997) at 4; and see *Cultural Study*, *supra* note 6.

[39] Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. [hereinafter *Constitution Act*]. Section 35(1) provides: "The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed."

In particular, one needs to enter the remainder of the discussion open to the possibility that Aboriginal peoples continue to employ a traditional conception of property. Moreover, this conception is not "primitive," a step on a graduated path to something akin to the sophisticated Western conception, but rather one that quite simply puts value not on ownership but on an interconnected web of responsibilities.

III. CANADIAN DOMESTIC LAW AND THE PROTECTION OF ABORIGINAL CULTURE

A. *The Test*

In 1996 the Supreme Court of Canada handed down a number of companion cases, key among which was *Van der Peet*.[40] This decision laid out tests that would be applied to claims pressed in relation to those Aboriginal rights worthy of protection under section 35 of the *Constitution Act*

If a case were to be made before a Canadian court for an Aboriginal right to the protection of the sort of "intellectual property" mentioned in the hypothetical situation discussed above, it would have to follow the guidelines being developed as the nature of the protection offered by section 35 of the *Constitution Act* is fleshed out and interpreted. Generally speaking, it would be fair to say that the process of fleshing out what section 35 means, and what it protects, has restricted the range of Aboriginal affairs that are considered worthy of constitutional protection.[41] Earlier movements that were promising have since been supplanted by jurisprudence which makes it difficult to argue before the present-day courts for truly substantive Aboriginal rights.[42]

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[40] *Supra* note 1.

[41] See J. Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 Am. Indian L. Rev. 37.

[42] As was repeatedly suggested in *Delgamuukw* at the Court of Appeal level, *Delgamuukw* v. *British Columbia (A.G.)* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.) [hereinafter *Delgamuukw C.A.*], claims to Aboriginal title and rights to self-determination might best be dealt with through negotiation. Clearly, though, this is to have to choose between two unsavoury options, for negotiation between the Crown and First Nations is fraught with pitfalls. Not least among the factors weighing against the possibility that negotiations would lead to anything like a "just" outcome are the relative negotiating positions—on the one hand, the Canadian state, with its immense resources, comes from a position of near-complete power, while, on the other hand, Aboriginal communities are supported with little but weak public opinion and some capacity to

The initial promise of a new era in jurisprudence on Aboriginal issues was generated by *Sparrow*.[43] Building on the notion of the *sui generis* nature of Aboriginal rights and title, the Court advocated a system whereby the Crown would now have to *justify* any infringement of existing Aboriginal rights (where existing rights are those not clearly extinguished by valid Crown action before the recognition and affirmation of Aboriginal rights in 1982).

While a promising development toward what one might think of as "post-colonial" jurisprudence,[44] this was only a movement in that direction, for it accepted the presumptions that (1) the Crown had the power to unilaterally extinguish Aboriginal rights prior to 1982, so long as its intent to do so was clear and plain; and (2) the Crown now has the power to infringe on Aboriginal rights, so long as it can justify this infringement according to standards set by Canadian courts. A truly post-colonial stance would be one which recognized and accepted that

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embarrass the Crown. Establishing a distinct regime of intellectual property protection may necessitate compromising other objectives, and might run into problems in the eyes of "the public" (given, for example, arguments about freedom of information in relation to the "public domain": see Guest, *supra* note 9 at 125).

The decision of the Supreme Court of Canada in *Delgamuukw*, *supra* note 1, does not seriously impact on this situation. While there are some highly suggestive comments in relation to the nature of Aboriginal title, and the extent to which it still exists and must be accommodated, little additional light is cast on the nature of Aboriginal rights in general. The *Van der Peet* test is still domestic Canadian law, so much as it stands, in this regard.

[43] *Supra* note 1. One could say that earlier cases, like *Guerin*, *supra* note 1, played a major role in setting the stage for the decision in *Sparrow*. In *Guerin* the Court laid out the role the Crown must play in dealing with First Nations, a role by and large determined by its being situated in a fiduciary or trust-like relationship created by its historic dealings with Canada's Aboriginal peoples. *Sparrow*, however, was the first occasion for the Supreme Court of Canada to set about the task of deciding what the nature and scope of Aboriginal rights might be in light of their entrenchment in the Constitution, and in its expression of principles began a movement beyond the patriarchal framework evident in cases such as *Guerin*.

Signaling a growing awareness of the difficulties inherent in applying the common law in the context of disputes over Aboriginal rights without regard to the colonial tenor that it sustains, the Court in *Sparrow* held, at 1112, that Aboriginal rights are "held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of … the 'sui generis' nature of Aboriginal rights."

[44] See J. (Sákéj) Youngblood Henderson, *The Míkmaw Concordat* (Halifax: Fernwood, 1997). Henderson defines post-colonial theory, at 23, as

> an intellectual strategy of colonized Aboriginal scholars and writers. It is a criticism that confronts the unequal process of representation by which the historical experience of the colonized Aboriginals comes to be framed in Eurocentric scholarship. It seeks to end the privileged position of Eurocentrism and colonial thought in modern society and create parity in modern thought.

Sparrow contained a faltering step in the direction of post-colonial jurisprudence insofar as it gestured toward the notion of parity in legal thought between Canadian domestic law and the laws of Aboriginal peoples.

Canada acted, and continues to act, as a colonial power, dispossessing peoples who had, and continue to have, prior legal and political status on the land lying within the boundaries of present-day Canada.[45]

Regardless of the extent to which *Sparrow* signaled a new era in Canadian/Aboriginal jurisprudence, to answer the question about the extent of judicial protection that the courts have made possible in relation to Aboriginal claims, we need to go beyond this decision. In particular, we need to look at the more recent Supreme Court of Canada decisions. Courts subsequent to *Sparrow* often found ways to narrow the implications posed by the echo of a post-colonial tenor heard in this landmark decision. This avenue was open since lower courts did not find in *Sparrow* directions on how to determine whether a claim fits as a claim to an Aboriginal right.

Along the way to the most recent Supreme Court of Canada pronouncements some "progress" was made towards filling this gap. In *Delgamuukw C.A.*[46] a test was laid down that, with some modifications, has come to be accepted as offering a guide to determining whether an alleged Aboriginal claim to title over a specified territory can be said to be protected as an instance of an Aboriginal right falling under section 35. This test is, in turn, born out of tests laid down in *Baker Lake*[47] and *Guerin*.[48] It asks the Aboriginal people in question to show: 1) that they [the Aboriginal people] and their ancestors were members of an organized society; 2) that the organized society occupied the specific territory over which they assert the Aboriginal title; 3) that the occupation was to the exclusion of other organized societies; and 4) that the occupation was an established fact at the time sovereignty was asserted by England.

This is drawn from *Baker Lake*, quoted with approval in *Delgamuukw C.A.* by the majority of the British Columbia Court of

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[45] There are those who see in *Sparrow* little, if any, post-colonial tenor. See M.E. Turpel, "Home/Land," *supra* note 34 at 20 [footnotes omitted]:

> Recent decisions of the Supreme Court of Canada, such as *Sparrow* and *Sioui* [*supra* note 1], have been hailed as progressive and seen as attempts to more fully embrace [A]boriginal images of legal and political responsibilities, creating the place for [A]boriginal peoples to stand and construct their vision of a relationship with the state. … Nevertheless, they are squarely within the colonial legal tradition. The acceptance without critical examination, in *Sparrow* for example, of the underlying sovereignty of the Crown over [A]boriginal peoples, situates the decision of the Supreme Court of Canada squarely within the colonial tradition.

[46] *Supra* note 42.

[47] *Supra* note 1.

[48] *Supra* note 1.

Appeal (speaking through Macfarlane J.A.),[49] and has carried over to the most recent pronouncements by the Supreme Court on Aboriginal claims to title. The clarification added by the Court of Appeal concerns the "exclusivity" requirement, for as the Court of Appeal noted it may be possible to imagine that hunting and fishing would be constitutionally protected Aboriginal practices that were not linked up with the practice of excluding all other peoples from particular territories.

The Supreme Court of Canada has pulled out of Macfarlane J.A.'s judgment a conceptualization of the nature of Aboriginal rights which has stabilized as the model for treatment of claims to protection of Aboriginal interests. In *Van der Peet*, Lamer C.J. noted that Macfarlane J.A. found in *Delgamuukw C.A.* that an Aboriginal right is to be accorded constitutional protection where evidence establishes that it had "been exercised, at the time sovereignty was asserted, for a sufficient length of time to become integral to the Aboriginal society."[50] This captures the tenor of the most recent pronouncements on Aboriginal rights, for it signals the closing of the "post-colonial" promise held out in *Sparrow*. To see how this is so, one needs to consider the underlying conceptual shift that has taken place, a shift made clear by the enunciation of a new "vision" of the purpose behind protecting Aboriginal rights. This vision is spelled out in great detail in *Van der Peet*.[51]

The key term is now "reconciliation," where careful consideration of the things to be reconciled is crucial. On one side of the reconciliation equation is the simple fact the Canadian system of law and governance must now squarely face: "when Europeans arrived in North America, Aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries."[52]

This passage carries a significant amount of just-below-the-surface information about how the Court is now going to deal with claims advanced by Aboriginal peoples. Built into the wording is a re-entrenchment of the common law position on the legal rights of Aboriginal peoples *vis-à-vis* the land—they did not, and do not, *own* the land, but rather have, at most, an odd, *sui generis*, "*beneficial interest*." The Court slides this in with the notion that Aboriginal peoples have

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[49] *Supra* note 42 at 512.

[50] *Van der Peet*, *supra* note 1 at 529, citing *Delgamuukw C.A.*, *supra* note 42.

[51] *Ibid.* at 538-48.

[52] *Ibid.* at 538 [emphasis in original].

always lived "*on the land*," an expression that captures this sense of a people riding on *top* of the land, not having the sort of deep connection which the Euro-Canadian system respects as ownership.[53]

Key to the discussion in this article is the reference in this passage to Aboriginal cultures. Continuing and solidifying a trend in Canadian jurisprudence, the emphasis in Aboriginal law shifts entirely to the nebulous realm of such things as "traditional practices" and cultural artifacts.[54]

The "simple fact" of historic Aboriginal occupation and use of land is now to be reconciled with the other side of the equation—the *fact* of Crown sovereignty. Since the historical situation is that Aboriginal peoples were "here first," the Court must replace the old tired colonial

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[53] I would suggest that this completely misses the nature of the relationship between Aboriginal people and the land as conceptualized through an Aboriginal perspective—rather than "riding on top of the land" Aboriginal people see themselves as part of the land, as being more than simply connected. The Western model of property typically conceives of the ownership relationship as grounded in recognition of certain powers of the owner, such as the exclusive capacity to control the use of the land. The land, then, does not so much form a reciprocal identity-relation with the owner as it is first objectified and then subsumed under the owner's identity.

For the Aboriginal community, on the other hand, the land itself is part of who they are *and* they are part of the land. What tighter connection could one imagine? In contrast to this vision how preposterous the Western conception seems (as if this essentially human-human-object relation *deserves* recognition and protection)! What justifies the "right" of the owner to control the use of the land to the exclusion of all others? The recognition accorded by society? But what exactly is society recognizing? Or, to put the same point in another way, what justifies the recognition envisioned? The "owner" is simply *riding on top of the land*, as a bronco-buster rides an untamed horse, with the difference being that the owner is sadly confused, for he or she will never subdue or tame the land. Without the identity-relation, the link between owner and the land is too tenuous to be justified by anything other than sovereign fiat. Again, what leads society to recognize the "right" of the owner to control the use of the land?

Someone in agreement with Crowley's basic position might argue that the relationship sanctioned through the Western concept of ownership has been developed to meet the need that arises in contexts of scarcity—without this sort of system there would be no efficient exploitation of resources and all would suffer. As I argued earlier, this line only goes so far in cross-cultural contexts. Without Western intrusion the Aboriginal relationship upheld, and could continue to uphold, an equally valid regime of land management.

[54] The focus on traditional activities or practices of Aboriginal societies has been linked to a particular time frame, the period before the assertion of sovereignty. The issue of time frame is seen as crucial in jurisprudence in this area, and tellingly in *Van der Peet* itself the majority of the Court went on to radically narrow what had, with this element, come to be an extremely tight noose around the necks of Aboriginal peoples. The Court decided that the assertion of sovereignty is not important. Rather it is the *point of contact* that is the key historical date. Some loosening of this noose was performed by the Supreme Court of Canada in *Delgamuukw*, *supra* note 1 at 1098, for the alternative time frames were separated. The Court there attempted to justify applying the point-of-contact frame to the determination of Aboriginal rights, in contrast to the application of the assertion-of-sovereignty frame, to the determination of Aboriginal title. Rather than unpack the Court's attempt, it would be best to stand back and ask whether the establishment of any fixed time frame should be an important and potentially determinative issue. See Borrows, *supra* note 41.

fictions of *terra nullius* and "discovery" and fall back on its one remaining story, elevating this to a new level of prominence—the Crown is unquestionably recognized as the sole legitimate sovereign power. The remainder of this section of *Van der Peet*[55] provides a deeper explication of this situation, as seen and justified through the eyes of the colonial masters.

The landmark American cases[56] from the first half of the nineteenth century are pulled in to support the notion that while Native claims have indeed always existed at common law, these claims must be reconciled with the unquestioned fundamental existence of European sovereignty. Similarly, the landmark Australian case *Mabo* v. *Queensland (No. 2)*[57] is mentioned briefly,[58] the intent being to support the same point. The idea the Court is working with is quite clear, if one accepts a return to the old colonial frame of mind: Aboriginal peoples were in fact "here first," but in pre-contact times they were only *users of the land*, not owners in the sense recognized at common law, and as such their mere presence was, and still is, subject to assertion of sovereignty by any European polity (read "advanced" and "superior" culture) happening upon the scene.[59]

What comes of this return to hegemony is a test for Aboriginal rights (the *Van der Peet* test) that focuses exclusively on the existence of traditional activities or practices integral to the society in question at the time of contact. Should evidence be presented and accepted that the right claimed today enjoys a requisite degree of continuity with a practice that was integral to the distinctiveness of the ancestors of the people in question, that practice, in its modern form, will be protected under section 35. It also must be kept in mind that (a) the right claimed must be carefully characterized as people-specific, but conceptually generalized; (b) the requisite degree of continuity does not require

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[55] *Supra* note 1 at 538-48.

[56] The seminal cases are commonly referred to as Chief Justice Marshall's trilogy: *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832). Lamer C.J., in *Delgamuukw*, *supra* note 1, does not mention the middle case in this series, perhaps because in that case Marshall C.J. introduced, and elaborated on, his notion of a "domestic dependent nation," a concept that, given its "sovereign-to-sovereign" undertones, would be too troublesome in the present context.

[57] (1992), 175 C.L.R. 1 (Aust. H.C.).

[58] See *Van der Peet*, *supra* note 1 at 544-46.

[59] The notion that Aboriginal peoples could have been recognized in political units is not even mentioned. Rather the tests are exclusively focused on whether or not the people in question were "organized into societies," as if this could somehow be accomplished without a political framework. Clearly a complete return to a colonial mentality has taken place.

temporal continuity; (c) the "distinctiveness" of the practice is determined by asking whether the people in question would be the people they were if this practice were not there, and; (d) the modern practice must be such that European influence is not responsible for its present manifestation or form.[60]

The ironic twist to this twisted tale is that the newly devised test, while pulling the courts back from post-colonial jurisprudence, makes room for the protection of manifestations of traditional Aboriginal culture. While, unquestionably, the Court in *Van der Peet* had in mind (minimally) protecting physical activities, the test it lays out works remarkably well in relation to those intellectual products identified earlier as lying closer to those elements that define the core or essential being of the Aboriginal life-world. That is, the test in *Van der Peet* seems oddly constructed to work well in relation to narratives, ceremonies, and other intellectual products of Aboriginal communities (with major provisos to be discussed shortly).

B. *The Application of the Test*

Let us return to the hypothetical situation. The first step in protecting against the inappropriate appropriation of the creation story would be to characterize the impugned right in such a way that it is people-specific, and yet cast in generalized terms. We can do this by characterizing the claim as the right to the exclusive control and use, by the Aboriginal community, of "culturally significant legends"—to borrow a phrase from *Queneesh*.[61]

The second hurdle would involve demonstrating that the interest in having exclusive control and use of these sorts of legends existed at the point of contact, and that it continues to this day. The latter point would not be too difficult to show (in most contexts), for many communities are in the midst of a process of cultural rejuvenation, exploring means by which they can reconnect with the "life-worlds" of their ancestors.

In some situations there could be, however, obstacles in relation to the first point. The Gustafsen Lake situation illustrates some of the

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[60] See Borrows, *supra* note 41. Borrows criticizes in turn each of these provisions, in particular calling into question the Court's decision to "freeze" Aboriginal rights at the time of contact. What is required, Borrows argues, is a test for Aboriginal rights which pays attention to the internal or inherent nature of the rights claimed, a test which would then rely on the Aboriginal perspective.

[61] *Supra* note 11.

evidentiary and conceptual problems.[62] On the one hand it might be argued that the sun dance ceremony was never practiced in the interior of British Columbia, a *fact* that, if true, would make it difficult to argue for a contemporary Aboriginal right to continue to practice this ceremony at that location. On the other hand, it might not be an issue about whether the sun dance was a practice carried out in the interior, but whether it could be *shown* that such was the case. What sort of evidence is available, what the court will permit itself to hear, what weight it will give to what it hears—these are the sorts of difficult evidentiary issues that might arise.[63]

The second set of obstacles are both more difficult to deal with and more enlightening in relation to the main topic of this article. It would need to be shown that the Aboriginal people in question had an interest in maintaining exclusive control and use of the creation story at the time of contact.[64] I believe this could be shown (in many if not most

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[62] In the summer of 1995 a group of Aboriginal people gathered at a religious site in central British Columbia to participate in a religious ceremony known by some as a "Sun Dance." The site is on a private ranch, and had been used in preceding years for the purpose of conducting this ceremony with little or no complaint from the rancher. On this occasion, however, a dispute with the rancher sparked and a stand-off between the Sun Dancers and police forces developed. Many of those who participated in the stand-off were charged with various counts of trespassing, mischief, and attempted murder. A report that discusses some of the ensuing legal and political battles and controversies can be found in J.G.A.E. Switlo, *Gustafsen Lake Under Siege: Exposing the Truth Behind the Gustafsen Lake Stand-off* (Peachland, B.C.: TIAC Communications, 1997).

[63] The Supreme Court of Canada decision in *Delgamuukw*, *supra* note 1 at 1069, would seem to have lowered the barriers in this regard, the majority holding that the oral testimony of Aboriginal peoples must be placed on an equal footing with the documentary evidence familiar to the courts. To see how this works out "on the ground" in Aboriginal litigation we will have to wait for further developments, to ascertain the extent to which Canadian courts not only listen to oral evidence, but afford it substantial—indeed potentially equal—weight.

[64] In characterizing the impugned right as to the exclusive control and use of this culturally significant story, we would then seem constrained by the test in *Van der Peet*, *supra* note 1, to show that this right existed at the point of contact. There are two factors that complicate the situation, one which acts to cause concern, the other which acts to alleviate some of this concern.

Sparrow, *supra* note 1, seemed to suggest a turn away from an analysis of rights that effectively froze them at contact. The Court held that Aboriginal rights must be conceived of as capable of evolving over time. The limitation on this notion of evolution is that such instances which reflect the incursion into the traditional activity of a direct European influence may not be protected (the test to apply involves asking whether the impugned right exists as characterized as a result of Western influence, so that it would not make sense to refer to this right as an *Aboriginal* right). We must consider, then, whether in the case of protecting the right to the exclusive control and use of a story, the influence of European forces account for the very need to protect the story. If this is so, some might argue, the test would dictate that this is not an *Aboriginal* right.

Here, however, it would seem that far from having to avoid protecting rights which derive their *substance* from European influence, the court would be asked to protect rights which derive from a need to protect certain elements of Aboriginal culture *from* European forces. Since the purpose behind the limitation to the doctrine of evolving rights lies in the need to avoid protecting rights that

contexts imaginable), notwithstanding the fact that any opposing party would have little trouble showing that many, if not most, Aboriginal peoples were willing to share most, if not all, aspects of their culture, right down to what I have referred to as the deeper core levels of culture—those values and principles that themselves structure the world-view of the various peoples.

The key point is that, in showing that historically Aboriginal peoples were willing to share what now they might express an interest in protecting from outside forces, one does not reveal any lack of interest in maintaining exclusive control and use of the element of Aboriginal culture in question. Historically (and *to this day*—so we could say, in a sense, *traditionally*) Aboriginal communities did not think of the sharing of a "culturally significant legend" as putting this legend into the "public domain."

One must be aware of the general principles of social or ethical conduct that underlie many, if not all, Aboriginal communities. Most Aboriginal communities would, once at ease with the person who shows an interest in learning about their culture, be willing to *share* their lives, and the structure that gives those lives meaning. This would not be seen as putting the knowledge transmitted into a public arena, so that it could then be accessed by *any other individual* with the slightest interest in hearing the story, or witnessing the ritual. The assumption would have been that the person hearing the story, or witnessing the ritual, would assume the *same responsibilities* as "anyone else" (*i.e.*, either any other community member, or any other Aboriginal person) in the same situation. *This* is how the community-based structures in place in Aboriginal societies are too easily exploited by outside forces. I will return to this point in the conclusion, for it shows both how one could successfully argue before a Canadian court that historically Aboriginal

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reflect Western culture, it would seem, in this sort of circumstance, that the fact that the Aboriginal people would not have to claim this right absent its interactions with Western forces would not engage this concern.

A second factor can be considered which, I suggest, makes this complication potentially less significant. Regardless of the fact that the impugned right "crystallizes" from the interaction of an Aboriginal people and Western influences, a means exists by which one could argue that the people had such a right prior to contact. The nature of this right can be captured in a counterfactual claim which could have been uttered at the time of contact:

> If it were to be the case that an individual or community external to our society were not capable of acting, or willing to act, respectfully in relation to this story (respecting, for instance, the conditions for appropriate retelling), then this individual or community would not be granted access to this story.

Regardless of the fact that prior to contact an Aboriginal community would have been unlikely to have encountered the sort of disrespect in relation to its intellectual products it might suffer post-contact, the right to the exclusive control and use of a central story could still have found a meaningful form of expression.

peoples had an interest in the exclusive control and use of culturally significant legends (and the like), and how any protection the Canadian legal and political system could offer would be unwanted and unnecessary.[65]

The next element of the *Van der Peet* test is that of continuity. The Court held that this requirement does not call for a simple temporal continuity, as if Aboriginal peoples today had to demonstrate an unbroken historical chain reaching back to pre-contact times. Rather, the aim is to protect only those elements of Aboriginal culture which are contiguous with the *same sorts* of elements at pre-contact. This sort of conception of "continuity" is rather problematic, but the problems need not concern us here. Since the interest is in seeing just what protection might be available in relation to those culturally significant legends which are, *ex hypothesi*, linked to the traditional narratives told in pre-contact times, problems with determining just what sort of link is envisioned need not detain us.

The need to demonstrate that the claimed Aboriginal right is intimately related to an element of the Aboriginal community that is integral to their existence is central to the *Van der Peet* test. One would imagine that this can be shown in relation to the culturally significant legends in question more easily than with, say, subsistence fishing. The question to ask is whether the Aboriginal people in question would be who they are without the particular element of their culture in question. Since we are considering an element of a people's life-world that is at the very core of their traditional identity, this would seem to be a fairly easily hurdle to clear.

The potential problems that arise are the same as were noted in relation to the "contact-point" element of the test. Specifically they have to do with the way the claim itself would have to be worded. The element of the Aboriginal culture in question that is integral to their identity is the narrative itself, while the claim to a right would have to be couched in terms of the exclusive control or use of this narrative. Would traditionally (here we are talking temporally, at pre-contact) Aboriginal peoples have been interested in asserting exclusive control over what we today identify as culturally significant legends? Or, and here is the real

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[65] Crudely put, there is an inversion of the rights/responsibilities relation at work in many Aboriginal societies: rather than posit rights that then impose duties, a society posits responsibilities that may, in cases of failure to comply, lead to the assertion of rights. Operating in concert with this inversion is the difference between rights based on the individual and rights that are communally determined. See *Cultural Study*, *supra* note 6.

problem with the decision in *Van der Peet*, is the perceived need for such control only on the scene today as a result of European influence?

In *Van der Peet* the Court held that Aboriginal claims which only have currency as the result of European influence cannot be thought of as "Aboriginal," and so are not going to fall under the umbrella of protection offered by section 35. This is a key part of their ruling, for in most of the cases that reach the higher courts the dispute has been, and continues to be, about such things as *commercial* fishing, an activity which the Crown has by and large successfully argued is an enterprise Aboriginal peoples only engage in as the result of European influence (which in these cases amounts to the introduction of a market economy, clear division of labour, and an economy of scale.[66])

One could make a powerful argument to distinguish the commercial cases from the sort of situation we are imagining. The European influence in the case of culturally significant legends has been of two kinds. First, we have the situation of appropriation—of European colonists taking such things as narratives, artworks, ceremonies, and the like, and using them either to make a direct profit, or to make careers out of a "study" of these. Second, we have the introduction of the "purely" economic aspect to the situation, as Aboriginal culture becomes a commodity to be bought and sold. Both of these influences have been decidedly negative, the first involving what is nearly universally perceived to be a great deal of disrespect,[67] the second bringing in the notion that Europeans have been able, from their position of dominance, to treat Aboriginal culture as property.

The sort of protection we are interested in exploring in this discussion, however, is not centred on the commercial factor, for we are not considering in this context protection of the sort which would

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[66] Even in those cases where something more than small-scale fishing has been found to be protected as an Aboriginal right, a quick reading of the decision will reveal that the commercial factor comes in to limit the scope of the fishing practice. In *R.* v. *Jones* (1993), 14 O.R. (3d) 421 (Prov. Div.), for example, while commercial fishing for Band sustenance was held to be protected as an Aboriginal (or treaty) right, this could not, the court went on, be equated to commercial fishing for profit. The key to such a finding is in the characterization of the impugned right (and, I would suggest, an enlightened court struggling with constraints imposed by *stare decisis*).

[67] The amount of disrespect felt depends on whether the events that surround the appropriation include dishonesty and deceit. In the case of more "innocent" appropriation (as when a scholar "takes" a narrative and writes an abstract thesis exploring its meaning) some may excuse the taking, and some may see this as not only harmless but flattering. Too often, however, the scholar obtained the narrative by deceit, making it seem to the informants that he or she was only interested in personal enlightenment, or in spreading the message contained in the narrative to a small body of other interested individuals. The principle of sharing would lead the informants into an act the community might later regret.

legitimize and support a powerful Aboriginal commercial interest, creating space for the expansion of exploitation of such things as creation stories (by Aboriginal "owners" and not outside elements). As has been argued throughout this discussion, those aspects of the traditional Aboriginal culture which, *from within the Aboriginal community*, are seen as worthy of protection are best conceived of—from this very same traditional world-view—as requiring protection from *any* commercial exploitation, no matter who might be the beneficiary.

This is a point at which some degree of post-colonial mentality appears to be needed by Canadian courts. The claim before a Canadian court must be couched, recall, as a claim to the exclusive control and use of culturally significant legends. This, I suggest, would be to transfer control to the Aboriginal community, though the control itself will not translate in the Aboriginal context into the sort of commodity-regulation powers that a Western world-view would envision.

The Canadian legal system is called upon, then, to affirm nothing more than the right of Aboriginal communities to control, *as they see fit*, the protection of their "intellectual products," which includes such culturally significant legends as creation stories. Once this control is recognized and affirmed, the Canadian apparatus must not interfere, even when the control the communities exercise does not lead to a viable marketplace of Aboriginal intellectual products, but rather the construction of a wall around the citadel of culture—those core principles and values which give meaning to the "art" that can be so highly praised by outside markets.

IV. CONCLUSION

Under the *Van der Peet* test it is quite conceivable that an Aboriginal community could argue that it has a right to the exclusive control and use of such things as culturally significant legends. Whether a particular people actually could convince a court that some such right was an Aboriginal right, and that it warranted protection under section 35 of the *Constitution Act*, cannot be said ahead of time, for much would depend on the sympathies of the bodies hearing the arguments and seeing and hearing the evidence.[68]

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[68] I would, if space permitted, argue that the *Van der Peet* test was designed to drastically narrow the scope of Aboriginal rights that will be granted protection under s. 35, but that the role of the judge is so important in relation to just this sort of test that nearly anything is possible (at least

I have attempted to weave into the application of the Canadian legal tests the thread of a deeper discussion that trails out of the second section of this article. The subtext concerns the usefulness of the Canadian legal system in this context. Even if a court was to hold that some such right was to be accorded protection as an Aboriginal right, what would be the outcome "on the ground?"

Imagine once again that a hypothetical First Nation went to Canadian courts seeking protection from what it perceives to be the inappropriate use of a culturally significant legend. While I have argued that this First Nation might "win" the legal contest, what, besides the court remedies available, would follow such a victory? Might we see legislation that attempted to control the actions of those outside forces alluded to throughout this article? What would this legislation attempt to regulate? Would there be legislation, falling loosely under the rubric of intellectual property, which dealt with the control and use of "culturally significant legends?"[69]

There are, however, two problems with such an eventuality. First, recall that the harm the Aboriginal community suffers at the hands of culture-thieves is not a result of the outsiders' "taking possession" of the significant artifacts, but in their disrespectful attitude toward the meanings the artifacts hold for the community. Any legislation that would assist Aboriginal communities should be limited to efforts to assist not in the creation of an Aboriginal marketplace of ideas, but in the creation of a wall of secrecy around Aboriginal culture, one which the Aboriginal communities could open and close as they see fit.

Second, it must be kept in mind that Aboriginal communities are best situated, and best able, to control the dissemination of culturally significant information. This is already being controlled and regulated. By and large the mistakes made in the past by communities and individuals have been—and continue to be—used as lessons in themselves (as is traditional). No longer do communities so quickly warm up to the anthropologist pulling into the reserve with the claim that he—using the masculine seems appropriate—just wants to "get to know how you live and play."

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with the lower courts). See *Mitchell* v. *Minister of National Revenue* (1997), 134 F.T.R. 1 (F.C.T.D.) for an example of how far a sympathetic judge can push the *Van der Peet* test.

[69] This is along the lines, perhaps, of the *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984*, Aust. Acts 1984, No. 79. As part of a recent review of the *Act*, issues surrounding how to deal with "secret/sacred" information are explored (especially c. 4, entitled, "Respecting Customary Restrictions on Information," online: <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/evatt/chapter4.html> (date accessed: 15 February 1999). The review is informative, and the recommendations, by and large, enlightened. See also *Cultural Study*, *supra* note 6.

What one finds within Aboriginal communities today is not the result of the creation of a new set of institutional controls, for the same principles and structures that have existed for generations are behind all this. The difference is that Aboriginal communities now know that by and large Europeans will not respect the teachings and that they *do* operate according to very different principles and values. The traditional way of maintaining control over the significant teachings *can* accommodate this unfortunate fact, and, even more importantly, must accommodate this fact. The principle of sharing still predominates, but it only comes into play when the community knows quite thoroughly the motives behind the actions of the outsider-on-our-doorstep.

But what of the problem of the misappropriation of culturally significant elements of Aboriginal culture which has and continues to take place? Is this not to ignore the inability of Aboriginal communities to adequately manage their intellectual products? If they could do so, the naysayers charge, there would not be the growing perception that a problem exists. It may be comforting to know that some communities have reacted to the Aboriginal/non-Aboriginal dynamic with inventive measures ensuring that sacred and valuable knowledge remains protected from outside commercial exploitation. Clearly, however, there remains much to be done in most regions, for many *Aboriginal* people decry the absence of means by which their cultures can be protected from outside interference and disrespect.

It is not just, though, that any protection the Canadian system could provide is unnecessary—it is also that it is inappropriate and ill-advised. I have suggested in this article that the Canadian side of the equation *could* provide, as supplementary assistance, some sort of prohibition on the use of such things as culturally significant legends by those who are not members of the community that traditionally would have had an interest in regulating the use of the legends in question. But this way of solving such problems is typically Canadian, and atypically Aboriginal. The appropriate solution to the problem *traditionally speaking*—note that it is not seen as the same problem on both sides of the equation—involves working towards a greater sense of responsibility. This is not something that works externally upon the individual moral agent (as the legal structures of the West seem constrained to do, given the underlying conceptualization of the individual and his or her autonomy and rights), but something that builds up from the inside.

The solution to the problem of outside appropriation and disrespect is to limit the dissemination of cultural knowledge to those who come searching with proper motives. This is, as I noted above, already the order of the day in many contexts of which I am aware. For

many First Nations, what I have referred to as the culture of a people, the core principles and values that go into structuring the world-view of the people in question, are not in any great danger of being misappropriated. Traditional structures are working at the task of protecting the use of traditional Aboriginal culture, and any assistance by the Canadian legal or political system would be unnecessary. In other contexts, where the structures and institutions are not in place, where there are little or no community means by which to adequately protect this sacred information, the answer is not, once again, to coordinate a response with the Canadian legal or political system. Rather, it is to continue work, *from within*, on the regeneration of these structures and institutions. In these contexts the supplementation by a Western framework is inappropriate.